

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

vs.

DAVID M. RICHARDS,

Defendant.

Case No. 1:18CR131

Akron, Ohio

Wednesday, September 5, 2018
2:40 p.m.

TRANSCRIPT OF SENTENCING HEARING
BEFORE THE HONORABLE JOHN R. ADAMS
UNITED STATES DISTRICT JUDGE

APPEARANCES:

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Proceedings recorded by mechanical stenography; transcript
produced by computer-aided transcription.

1 Wednesday, September 5, 2018

2 THE COURT: For the record, the Court has before
3 it today Case Number 1:18CR131. The case is United States
4 of America versus David Richards. We're here today for
5 sentencing.

6 Counsel for the government, are you ready to proceed?

7 MS. SKUTNIK: Yes, Your Honor. Carol Skutnik
8 from the U.S. Attorney's Office on behalf of the United
9 States of America.

10 THE COURT: On behalf of the defendant?

11 MR. LAZARUS: Yes, Your Honor. Jeff Lazarus,
12 Federal Public Defender's. We are ready to proceed.

13 THE COURT: Thank you.

14 I have before me -- I want to be certain everybody has
15 the materials -- the presentence report, investigation
16 report. I also have the parties' plea agreement. I have
17 the sentencing memorandum submitted by the defendant. I
18 also have a sentencing memorandum submitted by the
19 government.

20 I also have received, and want to be certain both
21 sides have it, I have the report from the Department of
22 Homeland Security, Homeland Security Investigation, Report
23 of Investigation which incorporates the statements, numerous
24 statements of the defendant related to his prior history and
25 conduct, etcetera, that I think are relevant.

1 Counsel for the government, do you have all these
2 materials? Do you have all the materials I just referenced?

3 If you were talking, I'll repeat it.

4 MS. SKUTNIK: No, Your Honor. I was showing Mr.
5 Lazarus a copy of the report that the Court was referencing
6 to make sure that he understood which report you were
7 referring to. I do have those materials, Your Honor.

8 I indicated to him that I believe the Court is
9 referring to report number 5 from the Department of Homeland
10 Security as it relates to the statements made to the agent
11 and then the polygraph materials made to Special Agent
12 Fragomeli.

13 THE COURT: That is correct.

14 Mr. Lazarus, have you seen it?

15 MR. LAZARUS: Your Honor, I received in
16 discovery -- I just want to make sure I'm looking at the
17 right one. This is the one that ends in 005 at the bottom?

18 THE COURT: At the very bottom, yes. It's
19 CL07QR18CL0008-005.

20 MR. LAZARUS: And that is a seven-page report?

21 THE COURT: Yes. It's dated February 23, 2018.

22 MR. LAZARUS: Yes. Then I have it, and I
23 reviewed it.

24 THE COURT: Additionally, it's my understanding
25 that there is a video recording made of the defendant's

1 interview with the government.

2 MS. SKUTNIK: That is correct, Your Honor.

3 THE COURT: How long is it?

4 MS. SKUTNIK: It is approximately 51 minutes
5 long, Your Honor.

6 THE COURT: All right. At this point, I'll hear
7 from counsel. It's my intention to either have it played
8 here in open court so that we can see it, observe it, or if
9 the parties would like me to review it in camera, I can do
10 that as well. But I think it's important that I do that and
11 that it be made part of the record in the case.

12 MS. SKUTNIK: I'll defer to Mr. Lazarus.

13 MR. LAZARUS: Your Honor, I'm not sure what the
14 purpose of having the Court review that video is. Some of
15 that substance has already been memorialized into the report
16 and some of it has even been memorialized by the United
17 States' sentencing memorandum. I think that would be
18 duplicative and not really worth our time.

19 I don't think anything Mr. Richards said during that
20 interview is in contest. So I'm not sure what the value is
21 for that. We don't think it's --

22 THE COURT: Well, the value is I could see the
23 defendant talk in great detail about the circumstances. I
24 can be sure that the details of the investigation, the
25 synopsis set forth by the agent, is completely accurate,

1 there is no confusion about any of the statements that he
2 made.

3 Wouldn't that be beneficial?

4 MR. LAZARUS: Your Honor, I'm letting the Court
5 know that myself and my client don't have any argument with
6 the report. So we believe the report fairly summarizes it
7 and is accurate. We don't think it needs to be reviewed.

8 THE COURT: Do you have any objection to me
9 reviewing it as part of my consideration of the sentence in
10 the case?

11 MR. LAZARUS: I just think it's duplicative.

12 THE COURT: It may be. I guess that's not my
13 question. Do you have an objection to me watching or
14 viewing the defendant making his statement so that I have
15 that information directly from his mouth, so to speak,
16 rather than relying upon the recitation set forth by the
17 agent?

18 Isn't it more -- wouldn't it certainly be more
19 beneficial to see his testimony in and of itself -- I
20 shouldn't say testimony. His statement.

21 What's the basis for your objection?

22 MR. LAZARUS: I don't think it needs to be done
23 in open court.

24 THE COURT: Why is that?

25 MR. LAZARUS: Your Honor, we sealed the briefs

1 because there is some very sensitive information. Obviously
2 there is sensitive information portrayed in that report. I
3 don't think it benefits all of us to witness the entire 51
4 minutes of this video.

5 THE COURT: Well, isn't it probative of the
6 nature and circumstances of the offense and isn't it
7 probative of the history and characteristics of the
8 defendant so that I can understand and you can all
9 understand, we can all understand what it is we're trying to
10 decide here?

11 A large part of this case is the reasons for the
12 Court's sentence: Just punishment, adequate deterrence,
13 protect the public, reflect the seriousness of the offense.

14 And the defendant's history and characteristics, his
15 background, his prior experience, his sexual conduct, his
16 conduct involving other minors allegedly, all of that, isn't
17 that all something that's relevant here?

18 MR. LAZARUS: It's all relevant, and it's all
19 summarized in the report by the agent. So I think all the
20 relevant information is already memorialized and could be
21 read by the Court and read through our various sentencing
22 memoranda and the presentence report.

23 THE COURT: Well, counsel, does the government
24 have a position?

25 MS. SKUTNIK: Well, Your Honor, as I noted in my

1 sentencing memorandum, I did supply this material to
2 both -- in both discovery to counsel and to the probation
3 department.

4 However, the Court would note that in the summary of
5 the facts of this case, it does not include a summary of any
6 of the defendant's statements nor his admissions to prior
7 sexual conduct as is included in the statements that I
8 detailed in my memorandum which is why I put, for example,
9 the polygraph statement verbatim in my memorandum.

10 But as the Court knows, the memorandum does not follow
11 the defendant to the institution, and the fact that I have
12 cited it in my memorandum does not make it part of the
13 record.

14 And so I do think it would be appropriate and relevant
15 to include the statements of the defendant either as
16 summarized in this report done by the Department of Homeland
17 Security as well as the written statement signed by Mr.
18 Richards as part of the polygraph examination. I believe
19 those should be made part of the record for purposes of this
20 sentencing hearing.

21 And if the Court wishes to hear the video, I have the
22 video prepared, however the Court wishes to proceed on the
23 video. I do believe that Special Agent Guyton did do a very
24 thorough report as it related to his interview, but I have
25 also reviewed the video of the interview as well.

1 So however the Court would like to proceed on the
2 video, but I do believe that his statements should
3 definitely be part of the record as they have not been
4 included in the PSR.

5 THE COURT: Well, the only thing that concerns me
6 about -- the only hesitation I have in playing the video is
7 because it does reference the name of the defendant's
8 daughter. And, again, she was a victim in his earlier gross
9 sexual imposition case. So I believe that's my only
10 hesitation.

11 Beyond that, I think -- again, I think it's beneficial
12 to all of us to see Mr. Richards and how he comports himself
13 and how he addresses the agents, all of the -- again, that's
14 why we have, in some respects it's almost analogous to the
15 Sixth Amendment right to cross-examination so that we can
16 all see and hear. And counsel can obviously then, if they
17 wish, comment on what they see. We have the report.

18 And counsel for the defendant, if you're going to
19 stipulate and agree that all the representations and
20 information contained in the report is complete and
21 accurate, and that is the report I've just referenced, if
22 you want to make that stipulation and allow it to be
23 included as part of the record in the case, then I will
24 consider that in lieu of playing the video.

25 (Counsel confers with defendant.)

1 MR. LAZARUS: Your Honor, I have spoken with my
2 client. It's his desire to enter a stipulation to the
3 report as written in lieu of playing the recording.

4 THE COURT: All right. Counsel, are you willing
5 to accept the stipulation?

6 MS. SKUTNIK: I am, Your Honor.

7 THE COURT: We'll note the stipulation. And I'll
8 make certain, I want to be sure that this report is part of
9 the record. It's something that's important for the Court
10 in considering a sentence in the matter.

11 So let's make sure that -- we'll make sure that it's
12 part of the record. And, again, I intend on relying on it
13 and using it in some respects as it relates to sentencing.

14 With regard to -- just so it's clear, does anyone need
15 any additional time to review that report before we go
16 further? Anyone have any further desire, need?

17 I know it's been produced in discovery. Any
18 additional time needed to review that report of
19 investigation?

20 Counsel for the government?

21 MS. SKUTNIK: I'm prepared, Your Honor.

22 THE COURT: Counsel for the defendant?

23 MS. SKUTNIK: I have reviewed it.

24 THE COURT: Thank you.

25 Counsel for the defendant.

1 MR. LAZARUS: We're prepared.

2 THE COURT: All right. Thank you.

3 Mr. Richards, did you go over the presentence report
4 that was prepared to assist me in deciding your sentence in
5 the matter?

6 THE DEFENDANT: Yes, Your Honor.

7 THE COURT: Counsel, did you review the report
8 with your client?

9 MR. LAZARUS: I did, Your Honor.

10 THE COURT: Thank you.

11 The report indicates there is an objection by the
12 defendant. The defendant objects to multiple paragraphs,
13 paragraphs 34 to 38 and paragraph 45 which refer to other
14 criminal conduct.

15 "Mr. Richards objects to these four paragraphs -- "
16 and I'll read the objection so it's clear for the record.

17 "Mr. Richards objects to these four paragraphs and the
18 unfounded allegations they raise. For obvious reasons, Mr.
19 Richards and his ex-wife have a very tense relationship.
20 Ms. Walker is extremely angry at Mr. Richards for his
21 conduct in the case involving their daughter. Ms. Walker
22 has a number of mental health issues of her own as well.
23 The allegations she raises are totally unfounded, completely
24 untrue, and should not be admitted into this report. No
25 police reports were ever made regarding any of these

1 allegations."

2 As to paragraph 38, the objection is, "For the same
3 reasons in the preceding objection, the paragraph should be
4 deleted. Ms. Walker's story is untrue, and Mr. Richards was
5 never arrested or charged in connection with this.
6 Therefore, it is not an 'other arrest.'"

7 And paragraph 45, with regard to Ashley, that is the
8 child victim in the gross sexual imposition case. The
9 defendant argues, "She is not a victim in this case, and her
10 desires for sentencing should not be included in the
11 presentence report."

12 The probation officer's response is, "18 United States
13 Code 3661 instructs that no limitation shall be placed on
14 the information concerning the background, character and
15 conduct of a person convicted of an offense which a court of
16 the United States may receive and consider for the purpose
17 of imposing an appropriate sentence. As such, the probation
18 officer maintains that the contested information is
19 appropriately included for the Court to review."

20 It says, "The probation officer did not report any of
21 the information in the contested paragraphs as fact but
22 rather as additional inappropriate sexual behavior as
23 recorded by others. Regardless of whether the contested
24 paragraphs involve aggravated or mitigating circumstances,
25 the probation officer maintains that the information is

1 permitted to be in the report. Additionally, this report is
2 background information. It may be beneficial to the Bureau
3 of Prisons and/or the U.S. probation officer supervising Mr.
4 Richards during his term of supervised release. Moreover,
5 there is no requirement binding the Court to consider these
6 contested paragraphs when imposing a fair sentence."

7 Having heard the objection, I did confer with both
8 counsel and suggest to counsel for the government that in
9 light of the objection, if Ms. Walker is desirous of coming
10 forward and testifying, that the Court would hear from her
11 if the government so desired.

12 Counsel for the government, what's your position at
13 this time regarding the objection?

14 MS. SKUTNIK: Your Honor, following our
15 conversation, or I should say our hearing by telephone, I
16 did contact Ms. Walker. She is present here in the
17 courtroom and is prepared to speak before this Court.

18 I've also had an opportunity to speak with Mr. Lazarus
19 prior to the commencement of our hearing. And we discussed
20 whether or not it would be necessary for Ms. Walker to take
21 the stand to repeat the matters that she has reported to the
22 probation department and that are included in the PSR.

23 I believe the parties both agree -- and Mr. Lazarus
24 can certainly correct me if I'm wrong. But the parties
25 agree that the statements contained in the report made by

1 Ms. Walker are those of Ms. Walker. Those are her
2 allegations of what was told to her and her recollections,
3 or representation of her recollections, as it related to Mr.
4 Richards, and that there are times when Mr. Richards'
5 statements differ from Ms. Walker, however, there are a
6 number of items that are discussed that are corroborated in
7 part by the statements of Mr. Richards.

8 For example, the incident at the mall. There is a
9 different version, but there is a reporting of that
10 material.

11 So I say all that because I believe that the parties
12 are recommending to this Court that it is not necessary for
13 Ms. Walker to testify here before this Court at sentencing,
14 but that her statements or her allegations may be considered
15 by this Court for whatever weight the Court believes is
16 appropriate to give the material, of course recognizing that
17 Mr. Richards has not admitted or commented on some of the
18 matters in there or may disagree with some of the
19 representations. And I believe they are listed in the
20 report as "alleged." That is the word that is included in
21 there.

22 And frankly, even if she does testify, which she is
23 willing to do today, it would not resolve the matter of
24 whether or not those are in fact truthful because, frankly,
25 those are her statements. She alleges them to be truthful.

1 And Mr. Richards objects or does not agree with all of the
2 statements. And he has different allegations.

3 So I think that is our position. Mr. Lazarus can
4 correct me if I'm wrong.

5 THE COURT: Wouldn't that give us an opportunity
6 to, with all due respect, to judge, or consider, I should
7 say, is a better term, Ms. Walker's credibility?

8 She can give her testimony if she would like, and then
9 the defendant can test that testimony if he likes through
10 cross-examination. Otherwise, I have the statements that
11 she gave to probation officers which are in essence hearsay
12 when she's here and present.

13 So I don't want it later on to be an issue on appeal
14 that, oh, the Judge considered these other -- this other
15 offense conduct but I didn't have a chance to challenge it
16 or to determine it's veracity, or what have you, because we
17 have a witness. We have the person who has made the
18 statements. And she is present.

19 MS. SKUTNIK: Your Honor, I don't want to speak
20 for defense counsel. Perhaps he can make a representation
21 as to how he would like to proceed.

22 THE COURT: I mean, I just find it difficult to
23 say, Judge, we object to this being included. It's not
24 true. And then the witness comes forward and says, well,
25 I'm here. I will be glad to tell you exactly what I know,

1 and then decline to examine her and to test whether or not
2 she's being truthful.

3 MR. LAZARUS: Your Honor, as far as her
4 truthfulness, I guess as far as the credibility that these
5 allegations were made to her, we don't really contest that,
6 that she became aware of Mr. Richards -- of allegations of
7 sexual misconduct by Mr. Richards. She received those
8 allegations, and we don't dispute that her receiving those
9 allegations are credible.

10 But the question that still remains is whether the
11 actual occurrences happened.

12 Now, if we interpret the presentence report as
13 allegations and not actual fact, then we're satisfied. We
14 understand that the allegations were made.

15 And specifically as to paragraphs 36 and 37, upon
16 further talking with my client, it's our understanding that
17 these actual paragraphs reference counts of his conviction
18 from his Cuyahoga County case. So we actually don't even
19 contest the truth of that because he did plead guilty to
20 those.

21 As to paragraph 38, the incident that happened in the
22 mall in Virginia, as Ms. Skutnik indicates in her sentencing
23 memorandum on page 9, Mr. Richards actually made admissions
24 that somewhat are consistent with what Ms. Walker's
25 recollecting. There are some differences in the finer

1 points, but the conduct occurred nonetheless.

2 So we really don't take issue with most of the
3 substance of it. We just want the Court to know that these
4 are simply allegations and not actual facts.

5 And the Court can obviously rely on them in
6 considering the 3553(a) factors. But our initial objection
7 was to the form in which they were -- in which they were
8 represented in the presentence report.

9 But based on Ms. Skutnik's representations to this
10 Court, I believe that we concur with that that's how they're
11 properly framed.

12 THE COURT: Let's read into the record what is at
13 issue here, what you're objecting to.

14 According to the report, paragraph 34, "The following
15 alleged information was obtained through independent
16 interviews with the defendant's ex-wife, Laura Walker, and
17 his daughter, Ashley." I'll defer reading her last name
18 into the record.

19 "In 2002," paragraph 35, "while attending his mother's
20 funeral, Richards allegedly attempted to put his hand up his
21 four-year-old niece's dress. The information was told to
22 Ashley by her aunt, the child's mother, following the
23 defendant's 2006 conviction for gross sexual imposition
24 against Ashley."

25 Paragraph 36, "In December of 2004, while at Walker's

1 mother's funeral," apparently the same event, "Richards
2 allegedly groped Walker's 16-year-old cousin. Thereafter, a
3 relative allegedly punched Richards in the face."

4 Paragraph 37, "In addition to all of the above, Laura
5 Walker advised that the defendant groped four of her minor
6 cousins at various family functions, graduation and holiday
7 events, for years prior to his 2005 arrest; however, none of
8 the children reported the incidents until after his arrest."

9 And then paragraph 38, "Although no record could be
10 located to verify this information, Laura Walker advised the
11 defendant was arrested for masturbating in a mall in
12 Virginia in November of 1990. At the time they lived in
13 Virginia for Richards' career in the U.S. Navy. Walker
14 stated that the defendant was observed masturbating near the
15 Santa section and exposed his penis to a woman working in a
16 jewelry store on Black Friday. Walker advised that after a
17 law enforcement officer called the residence to tell
18 Richards of the warrant for his arrest, Richards violently
19 raped --" and so forth. "According to Walker, witnesses
20 failed to report to his court hearing, and Richards was
21 acquitted of this charge in 1992."

22 So that is what Ms. Walker shared with the probation
23 officer.

24 Ms. Skutnik, have you talked to her? Does she have
25 any other information to share that might be of benefit for

1 either side in the case?

2 MS. SKUTNIK: Your Honor, I did not interview Ms.
3 Walker on today's date. I have communicated with her in the
4 past by -- I believe by one telephone call and also several
5 e-mails back and forth.

6 And her information generally focuses on the events
7 that she has delivered to the probation department.

8 THE COURT: All right. Anything else?

9 MS. SKUTNIK: Not on my behalf, Your Honor.

10 THE COURT: Counsel for defendant?

11 MR. LAZARUS: No, Your Honor.

12 THE COURT: So in essence you're indicating I can
13 rely on the information set forth in the report at
14 paragraphs 34, 35, 36, 37, and 38 as allegations made by the
15 defendant's ex-wife?

16 MR. LAZARUS: Your Honor, with that understanding
17 then, we would, I guess, defer to the Court.

18 THE COURT: All right. Thank you.

19 Anything else before we turn to the advisory guideline
20 calculation?

21 MS. SKUTNIK: Nothing further from the United
22 States, Your Honor.

23 MR. LAZARUS: As far as objections to the
24 presentence report? Is that what the Court's referring to?

25 THE COURT: Yes.

1 MR. LAZARUS: No, Your Honor.

2 THE COURT: At this time the objections will be
3 overruled for the reasons I've just stated. The facts as
4 described have been set forth in the report. They're set
5 forth as allegations based upon the representations of
6 counsel that the Court can consider them and consider them
7 as such.

8 I'll, again, overrule the objection, and they'll be
9 set forth for whatever use that may be made of them. Again,
10 the focus being on potentially corroboration by other means,
11 by defendant's statement, etcetera.

12 Turning to the guideline calculation, there is a
13 guideline calculation recommendation set forth at paragraph
14 15 of the parties' presentence investigation
15 report -- excuse me, the parties' plea agreement. I stand
16 corrected.

17 In terms of the guideline calculation in the PSI, that
18 also -- a separate calculation has been made. And that
19 calculation is set forth in the report.

20 And it begins at page -- just a moment. We have quite
21 an extensive report. The calculation in the report, or in
22 the parties' plea agreement, calls for a base offense level
23 of 22.

24 A prepubescent minor or minor under the age of 12, the
25 advisory guideline enhancement of two levels.

1 There is a two-level recommended guideline computation
2 for knowing distribution of two levels.

3 And then there is a sadistic or masochistic material
4 enhancement of four levels.

5 There is the use of the computer of two levels.

6 And the 600 or more images is a five-level
7 enhancement.

8 And then there is an enhancement -- or a subtotal
9 before acceptance of responsibility of 37.

10 That is what is recommended by the parties.

11 The probation department has included an additional
12 enhancement in this matter. And that is four levels because
13 of the pattern of conduct, as I understand the additional
14 four levels that the probation staff has recommended.

15 Counsel for the government, am I correct, that is the
16 position of the probation staff?

17 MS. SKUTNIK: Your Honor, according to the plea
18 agreement, the parties reserved the right to argue over
19 whether or not the pattern of activity enhancement applied.
20 The government does advocate and believe that the pattern of
21 activity enhancement applies, and the defendant reserved the
22 right to object to that guideline enhancement.

23 And the Court is correct that the report does, in
24 paragraph 21, apply -- or I'm sorry. I quoted the wrong
25 one. In paragraph 19, the probation department does apply a

1 five-level enhancement for pattern of activity involving the
2 sexual abuse or exploitation of a minor.

3 THE COURT: Under 2G2.2(b) (5) .

4 Counsel for the defendant, why do you object or why do
5 you believe it does not apply?

6 MR. LAZARUS: Your Honor, we don't object. While
7 we reserved the right in our plea, upon review of the
8 presentence report, we do not have an objection to the
9 enhancement.

10 The Court did reference that it was four levels. It's
11 actually five levels under subsection (b) (5) .

12 THE COURT: All right.

13 MR. LAZARUS: So we do not have an objection to
14 that enhancement.

15 THE COURT: I'll stand corrected. Then the
16 offense level becomes a 39.

17 And the criminal history category is a II.

18 And subject to -- does the government seek a downward
19 adjustment for acceptance of responsibility?

20 MS. SKUTNIK: The government would make that
21 motion, Your Honor.

22 THE COURT: So from the 39 there would be a
23 three-level downward adjustment. And therefore the total
24 offense level becomes a 36 in this case.

25 At offense level 36, criminal history category II, the

1 advisory guideline range is 210 to 262 months.

2 Counsel for the government, do you have any objection
3 to the calculation?

4 MS. SKUTNIK: Your Honor, I believe that the
5 defendant's adjusted offense level is a 42 and then a 39
6 after acceptance.

7 THE COURT: I'm sorry. I do stand corrected.
8 You're right. I was looking at the other calculation.

9 So, therefore, the 39 would apply.

10 Counsel for the defendant, do you have any objection
11 to the guideline calculation, please, other than your
12 arguments for variance, etcetera?

13 MR. LAZARUS: We just want to make sure that the
14 Court is correct. At 39/II, the range under the guidelines
15 table is 239 to 265 months, but because of the statutory
16 maximum it's capped at 240 months which would be the
17 guideline range. We concur with that.

18 THE COURT: I agree. Thank you, counsel.

19 That would be the guideline range, again, subject to
20 arguments for variance or departure, although departures are
21 prohibited under the Protect Act. So we will deal with, of
22 course, the various arguments for a variance.

23 Counsel for the defendant, I have reviewed your
24 extensive briefing.

25 What if any additional argument would you like to make

1 as it relates to this case, please?

2 MR. LAZARUS: Thank you, Your Honor.

3 Your Honor, we're asking this Court to consider a
4 variance below the sentencing guidelines range, below the
5 statutory maximum, as Mr. Richards is not the worst of the
6 worst offenders who would deserve a statutory maximum
7 sentence.

8 I want the Court to know that from the moment that
9 this case began, from the moment that I began representing
10 Mr. Richards, he has admitted to his offense, that he has
11 expressed significant remorse. He recognizes the harm that
12 he's caused his family in his actions in this case and in
13 his actions in the past, and he recognizes the harm that his
14 offense has caused to the victims. And he has expressed
15 great sorrow and great remorse for that.

16 He also wants the Court to know that he knows that he
17 has a problem. He knows that he has severe mental health
18 issues, and his attraction to these types of images and
19 material is something that obviously he should not be doing.
20 But he wants the Court to know that he has a problem, that
21 he wants treatment, and that he knows that he will be
22 serving a significant sentence in the Bureau of Prisons to
23 get him the help he needs and get him the treatment that he
24 needs.

25 But we want the Court to consider several mitigating

1 factors. And before I talk about the specific factors that
2 apply to Mr. Richards, I want to talk just briefly about the
3 guidelines generally.

4 As we discussed in our sentencing memorandum, we
5 believe that the sentencing guideline range, while factually
6 applicable, overly inflates his sentencing guidelines range.

7 There is certain -- obviously the Court has gone
8 through the litany of sentencing enhancements that apply in
9 this case. And Mr. Richards gets, you know, almost every
10 enhancement there is. And these take his offense level from
11 a base offense level 22 to a total offense level of 42
12 before acceptance of responsibility.

13 Some of these enhancements are applied in virtually
14 every case involving these types of images. And we believe
15 that when an enhancement is imposed in 95 percent of the
16 cases or more, it doesn't actually qualify as an
17 enhancement.

18 We're not saying it doesn't factually apply. And
19 we're not saying that the whole 2G2.2 should be thrown out
20 and scrapped. We're just saying the Court can consider the
21 fact when these enhancements are piled up in each and every
22 single case, that they result in a sentencing guidelines
23 range that is greater than necessary and warrants some
24 consideration of a variance.

25 And the Court can do that, can disagree with the

1 policy under Supreme Court case law that's cited in our
2 brief.

3 But I want to focus specifically on three
4 enhancements.

5 Use of a computer. So Mr. Richards gets two levels
6 because this offense is committed with a computer.

7 Now, having practiced in Federal Court now for ten
8 years, I have not seen a case that doesn't involve this
9 enhancement. This enhancement comes in in each and every
10 one of these cases.

11 So to say that this offense is enhanced because of the
12 use of a computer is somewhat duplicitous. It's double
13 counting. And it imposes a sentence that is a base offense
14 level -- or a total offense level that is higher than we
15 need.

16 THE COURT: Hasn't the Circuit rejected that
17 argument directly, that the imposition of 2G2 -- or I'm
18 sorry, the imposition of the use of a computer is not double
19 counting? Isn't there a published opinion on that point?

20 MR. LAZARUS: They have not said that as a matter
21 of law it is automatically double counting, but the Court
22 does have discretion to consider that.

23 And several of your colleagues have rejected that
24 enhancement. I know for a fact that Judge Polster and Judge
25 Zouhary routinely give a two-level variance because of these

1 issues, because they believe it is double counting.

2 So the Court has discretion to consider that under the
3 3553(a) factors. We're not saying as a matter of law it
4 needs to be scrapped or thrown out.

5 THE COURT: No. That is not my question. Isn't
6 there a Sixth Circuit case -- I think I have one on my desk
7 as I prepared -- that says it is not double counting to
8 apply the use of the computer enhancement?

9 MR. LAZARUS: And we're not --

10 THE COURT: Isn't that the state of the law
11 currently?

12 MR. LAZARUS: We're not saying it is
13 automatically double counting. But we're just saying the
14 Court can consider the fact that this enhancement keeps
15 coming up time and time again in every case in considering
16 what is the appropriate guideline range and what should be
17 the appropriate sentence.

18 So the Court is correct that it is not automatically
19 double counting. But it is something the Court can consider
20 in a wide range of other factors under 3553(a).

21 THE COURT: All right. Thank you.

22 MR. LAZARUS: And the same is true of the victim
23 under 12. I'm not going to make the same argument, but the
24 same reasoning does apply.

25 As far as the number of images, we want the Court to

1 know that in a case --

2 THE COURT: Why does that apply, because isn't it
3 certainly an aggravating circumstance if, if -- these cases
4 are so difficult, but if an individual, like this defendant,
5 is attracted to individuals as young as six years old, six
6 to twelve, children, young children, isn't that an
7 aggravating circumstance?

8 Isn't that something that I should be considering
9 rather than someone who is attracted to 15, 16, 17? All
10 illegal. All inappropriate. But certainly on the scale of
11 these things -- and it's hard to, again, place them on some
12 scale.

13 I have a hard time with an argument that I shouldn't
14 consider it aggravating that a person likes to watch young
15 children being raped at the age of six or seven or doesn't
16 get some sort of gratification from that, that that's not an
17 aggravating circumstance, that that's not a circumstance
18 that should give me cause and concern and increase the
19 guideline range.

20 MR. LAZARUS: Well, Your Honor is bringing up two
21 separate enhancements at once. One is the victim under 12,
22 and the second is the sadistic or masochistic.

23 A child being raped would incorporate both of those
24 enhancements and give a six-level. We're talking
25 specifically about the child under 12. And as cited in our

1 brief, that enhancement is imposed in over 95 percent of the
2 circumstances.

3 So while philosophically --

4 THE COURT: Which enhancement? One or both?

5 MR. LAZARUS: The victim under 12. The sadistic
6 masochistic has less frequency.

7 So focusing specifically on the victim under 12, that
8 enhancement is given in 95 percent or almost every case.

9 So while we can talk about the philosophy, obviously
10 that is an aggravating factor. When that aggravating factor
11 is imposed in virtually every case, we believe it unjustly
12 and irrationally aggravates his sentencing range.

13 THE COURT: Well, I haven't heard from the
14 government, but I guess I'll tell you out of hand, having
15 presided over some of these cases -- and they are all
16 difficult; they're all very difficult -- as a policy matter
17 I reject that argument.

18 I think it's clearly appropriate -- and the Commission
19 may have considered it. It's clearly appropriate that there
20 be some sort of enhancement under the guidelines for
21 children under 12. I reject out of hand any policy argument
22 that the mere fact -- unfortunately, tragically, so many of
23 the victims are children under 12, that as a policy matter I
24 should consider that and not impose that enhancement, or in
25 some way, shape, or form modifying the sentence.

1 I think to the contrary, as the guidelines counsel, I
2 think if the child or victim is under 12, then I think there
3 should be some sort of enhancement. As a policy matter, I
4 would think there should be a greater enhancement if the
5 child is under six.

6 MR. LAZARUS: Your Honor --

7 THE COURT: Strictly as a policy matter.

8 I mean, I'm just being candid with you. That argument
9 doesn't hold a whole lot of water, particularly when you're
10 talking about children, little victims who are children.

11 So next argument is to sadistic/masochistic. You want
12 to argue that that --

13 MR. LAZARUS: We're not arguing that.

14 THE COURT: I would hope not.

15 MR. LAZARUS: But, Your Honor, there is a
16 difference between the abstract of how bad these images are,
17 how these cases are actually being prosecuted, and when the
18 enhancements are coming in.

19 It's our position that when an enhancement is imposed
20 every time, in every single case, that it's inherent in the
21 offense and should not be considered an aggravating factor.

22 THE COURT: Well, that's just related to the
23 guidelines. That's just a guideline calculation. That has
24 nothing to do with -- once again, we can go beyond the
25 guidelines, and we look at the facts and circumstances, the

1 nature and circumstances of the offense, the history and
2 characteristics of the defendant. We look at a wide range
3 of other information.

4 The guidelines are the benchmark. They're the
5 starting point. But to argue that, again, that the
6 guidelines are in some way, shape, or form either misguided
7 or I shouldn't follow them, you know, philosophically, I
8 disagree. Actually I disagree with my colleagues.

9 I think philosophically the guidelines are appropriate
10 in these kind of cases, that we are far too often focused on
11 who? The defendant. We're not thinking about the victims.
12 And that's why when you argue that, again, the enhancement
13 is applied across the board for children under 12, I say to
14 myself, wait a minute. What about the victims? What about
15 the victims? Let's talk about them.

16 MR. LAZARUS: Yes, Your Honor. And Mr. Richards
17 has great remorse for the harm that he has caused these
18 victims. And we understand that, and he knows that he is
19 going to get a significant sentence because of the harm that
20 he caused these victims.

21 But we're trying to figure out what is an appropriate
22 sentence for this case.

23 THE COURT: Again, let me help you out, perhaps.

24 The focus here should be -- the challenge that you
25 have in this case is not the guidelines. The challenge is

1 not the guidelines. If I use the guideline range, a lower
2 guideline range, the challenge is not the guidelines.

3 The challenge is the history and characteristics of
4 the defendant, his prior conviction for GSI, his admitted,
5 if you read his statements to law enforcement, his admitted
6 pattern of attraction to young children, six to twelve, I
7 think, if I recall his statement correctly.

8 And the pattern that he has had of being sexually
9 attracted to children, including his own daughter's
10 classmates, those are the kinds of things that make it
11 difficult.

12 When you have a defendant who is not some -- and
13 again, I'm not minimizing looking at pictures. But here we
14 have what we call, in the words of the Commission, a
15 hands-on -- the commission's report. We have a hands-on
16 offender, right?

17 MR. LAZARUS: That's correct.

18 THE COURT: So that makes this case entirely
19 different than the kinds of cases I think you're trying to
20 compare and contrast it with. All the disparities that you
21 talk about in terms of the guidelines don't carry a lot of
22 weight when you think about -- again, you can distinguish
23 all that from defendants who are -- you look at the nature
24 of the pictures they have. We can talk about that. You
25 look at his involvement with others in the community. We

1 know about that. We have the chats, right? He's chatting
2 with other like-minded individuals. This investigation
3 began in New Zealand, right?

4 MR. LAZARUS: That's right.

5 THE COURT: So we have that.

6 And then we also have the prior history of hands-on
7 offending which puts this defendant in -- again, most
8 challenging for you, this puts this defendant right in the
9 crosshairs of what the Commission has said when you talk
10 about the guidelines, at least in my mind, the more
11 appropriate in many ways, at least equally important
12 considerations.

13 So you can argue the guidelines back and forth with
14 me, back and forth. And I want to be fair. But the
15 guidelines really aren't what drives the sentence in this
16 case. No way, shape, or form.

17 What drives this case is the history and
18 characteristics of the defendant and the nature and
19 circumstances of this offense. We know what this is about.
20 But his prior history is what's really most difficult.

21 And then we have the need for the sentence. What do
22 we do with someone who has, over many years, involved
23 himself in -- is sexually attracted to children, admittedly,
24 and who has acted out on that behavior.

25 MR. LAZARUS: That's correct, Your Honor. And

1 Your Honor, he is looking at a significant sentence, and the
2 guidelines do give him a significant penalty for that with
3 the five levels for the pattern activity and the increase in
4 his criminal history score.

5 So part of his history is taken into account in the
6 guidelines because of the offenses he has in the past.

7 But we want the Court to know that the prior hands-on
8 offenses that we're all talking about are 15, 20, 30 years
9 old. That if we look at this offense that Mr. Richards
10 committed, it is a fairly typical child pornography offense.
11 We're talking about Mr. Richards being involved in posting
12 links online. And the amount of images that were found on
13 his computer is relatively small compared to most other
14 child pornography offenses. We're talking about less than
15 20 videos and several hundred images.

16 So he gets five levels under the guidelines for that,
17 whereas if he had 10,000 or 100,000 or a million images, he
18 would get the same guidelines enhancement.

19 So we just want the Court to understand the facts and
20 circumstances of this offense.

21 But more importantly as to this offense, Mr. Richards
22 admitted his conduct. We want the Court to consider the
23 fact that from the moment that law enforcement came to his
24 door and started asking him questions, he admitted his
25 involvement. He's never denied that he was involved in

1 these types of images. He has never denied his conduct. He
2 admitted to law enforcement. He gave a full confession. He
3 submitted to a polygraph examination.

4 He then came to this Court and pled guilty and has
5 accepted responsibility, allocuted -- he's going to allocute
6 later before this Court.

7 But we also want the Court to consider his history and
8 circumstances because obviously there are a lot of negative
9 things in there. But it's not all negative. And we want
10 the Court to consider some of the positive things that have
11 gone on in his life and some of the things that happened in
12 his childhood that are not an excuse for his behavior but
13 help to paint a clearer picture of how someone could become
14 this damaged and could have these types of problems based on
15 the things that happened to him and the traumas that
16 happened to him as a child.

17 He was molested himself. He was abused. I'm not
18 going to go through all the specifics because the Court has
19 read our sentencing memorandum. But he was taken advantage
20 of by older men, by older boys in the neighborhood. He was
21 treated unfairly. He was abused. He was subjected to the
22 same abuse that some of the victims of his current offense
23 have been subjected to.

24 And Mr. Richards went through and graduated high
25 school. And shortly after high school he joined the

1 military. And he spent over 20 years in the United States
2 Navy. He served this country.

3 And we want the Court to understand that he has done
4 some good things in his life. He takes much pride in
5 serving his country and being an active member in the United
6 States Navy which he was able to demonstrate his devotion to
7 this country.

8 His offense doesn't negate that. His offense doesn't
9 make it that it didn't happen. We just want the Court to
10 understand that he did spend a significant period of his
11 adult life devoted to our armed services.

12 And then, once that was completed, he then went into
13 the work force. He has a significant work history which is
14 detailed in our sentencing memorandum. He worked a number
15 of jobs, some of which for many years at a time. He worked
16 for our own federal probation office for seven years in
17 human resources. He was able to get a job in the Veteran's
18 Administration.

19 He's really, other than the time that he was
20 incarcerated, he was either employed or in the Navy for his
21 entire adult life. And we believe that that is significant
22 and takes him to a point where he is different from many of
23 the other defendants that come before this Court for similar
24 offenses.

25 David knows that his offense is heinous. He knows

1 what he has done to his family and to his victims. And he
2 understands that it is reprehensible and something he has
3 great shame for. He has never denied that.

4 But in focussing on this offense, we have a relatively
5 small number of images that we're dealing with here. We --

6 THE COURT: When you say "relatively small," is
7 it not 600, but when you count the videos, aren't we at
8 1,600 or plus?

9 MR. LAZARUS: That's correct.

10 THE COURT: Weren't there a substantial amount
11 being -- not that we can hold that against him, but I think
12 the evidence is that he would delete -- he would receive and
13 then delete a great deal. Is that not?

14 MR. LAZARUS: Well, the ones that were deleted
15 were recovered by forensic review by law enforcement. So
16 those are taken into account in the total number.

17 What we're talking about, I believe, the note is 18
18 videos which ends up being over 1,000 images just based on
19 the calculation. So that is taken into account. But in
20 comparison to the other similar child pornography cases,
21 this is a relatively small number. Most of the cases that
22 come before these courts dealing with these child
23 pornography offenses are talking about hundreds or thousands
24 of videos and thousands upon thousands of pictures.

25 So we want the Court to consider this offense and the

1 conduct we have here which is relatively small compared to
2 the vast number of cases. And we believe that that's
3 something the Court should consider in determining
4 sentencing disparities and the appropriate sentence.

5 We also want the Court to consider David's mental
6 health. David has a long history of mental health issues.
7 He was receiving treatment for them.

8 He suffered from post traumatic stress disorder and
9 anxiety. He was receiving services from the VA for over ten
10 years. He was trying to deal with these issues.

11 THE COURT: What issues?

12 MR. LAZARUS: I'm sorry?

13 THE COURT: What issues was he trying to deal
14 with?

15 MR. LAZARUS: He was trying to deal with the
16 issues that were related to his attraction to children.

17 THE COURT: What evidence is there of that? Do
18 you have any statement from the VA?

19 I'm just -- I'm curious. Do we have a doctor or
20 someone who has rendered a report indicating that he was
21 receiving counseling?

22 I understood that he was receiving some counseling for
23 depression or some other type of illness. I didn't see
24 anything to reflect the fact that he was receiving
25 counseling related to his attraction to children.

1 MR. LAZARUS: I reviewed about 500 pages of
2 Veteran's Administration records. There is no specific
3 reference to him being attracted to children in those
4 records. But -- and I have tried to contact the doctor, but
5 I was not able to contact her.

6 Mr. Richards does tell me that this was something he
7 disclosed, that he did have this attraction.

8 THE COURT: Is there anything in his records?
9 I'm sorry. You told me there was not.

10 MR. LAZARUS: There is not.

11 THE COURT: So there is nothing in the record
12 saying, "discussed with Mr. Richards" or "discussed with
13 David today his attraction to children"? That was not part
14 of the psychiatric record?

15 MR. LAZARUS: The specific issues that he
16 discussed other than the actual diagnosis were not
17 discussed. So they diagnosed him as having depression or
18 anxiety and post traumatic stress disorder, but there was no
19 reference to the specific topics that were discussed.

20 But we wouldn't expect to see that in these Veteran's
21 Administration records.

22 THE COURT: Why would you not? If I'm someone
23 who has this attraction -- he was very forthright with the
24 agent about his ongoing constant attraction to children.
25 Why would he not talk to his counselor, his psychiatrist,

1 and say, you know, I think I have this problem and maybe I'm
2 a pedophile. You know, I hate to use that term. But I've
3 had this ongoing problem.

4 Why would that not be something you would want to
5 discuss with a psychiatrist? Isn't that a lack of insight?
6 Isn't that someone who is perhaps more dangerous if they're
7 not trying to reach out and get help?

8 I mean, he receives a VA disability. So he's not
9 paying for these services. So he has the option or the
10 opportunity to get that kind of help. That's another
11 question.

12 MR. LAZARUS: Well, Your Honor, we just want the
13 Court to understand that he was seeking treatment. He was
14 seeking help because he knew that he had a problem and he
15 wanted to address that. So we believe that that is
16 something that the Court can consider, that he was trying to
17 seek it out.

18 We also want the Court to consider the fact that he
19 has letters of support which the Court has attached to our
20 sentencing memorandum. And there is a number of people in
21 the community who know David and who think highly of him
22 despite his offenses. They're all aware of his prior
23 conviction, and they're aware of what he's currently -- why
24 he's before the Court. But they believe that he is a good
25 person deep down.

1 Heather Hoty, who is referenced in one of our letters,
2 is here in the courtroom today. She has been very helpful
3 and she stands by David.

4 The other letters that we have referenced are all
5 people in the community, none of which have criminal
6 records, who know David from either church or just from the
7 community. And they believe that deep down he is a good
8 person, that he has done good things in his life. And we
9 want the Court to consider that.

10 In total, obviously these offenses speak for itself.
11 The Court is aware and David is aware that this is a
12 reprehensible and terrible offense in which people were
13 victimized.

14 David also understands he has a history dating back
15 over 30 years of hands-on offenses and that the Court has
16 considered that and is aware of that.

17 But he has done some good things in his life. He has
18 worked. He has been in the military, and he has developed a
19 community support system. And he recognizes his mental
20 health issues.

21 But he wants the Court to know that given all of that,
22 given all the consideration of his background and all the
23 things that he has done, that he is not the top end, that he
24 does not warrant the statutory maximum in this case.

25 And we believe that the Court should impose a variance

1 that adequately reflects his history and circumstances and
2 the mitigating things in his life.

3 And it will be a significant sentence that does
4 properly account for his offense and for the victims in this
5 case.

6 So we're asking the Court to impose a variance at
7 sentencing accordingly.

8 Thank you.

9 THE COURT: All right, sir. Thank you.

10 Mr. Richards, what if any statement do you want to
11 make on your own behalf, please?

12 THE DEFENDANT: Yes, Your Honor. Good afternoon,
13 Your Honor. I thank you.

14 As you may understand, Your Honor, I'm very nervous.
15 If it please the Court.

16 THE COURT: Relax. Just take your time. There
17 is no reason to be nervous. I know this is an important and
18 difficult day. Take your time.

19 THE DEFENDANT: Yes, Your Honor.

20 I would like to read from a prepared statement.

21 Your Honor, I do thank you for the opportunity to
22 address this Honorable Court. Mere words cannot express my
23 sorrow, shame, and remorse for my actions. So with this
24 Honorable Court's leave, please permit me to express in the
25 strongest possible language that I am sincerely remorseful

1 and that I am deeply and humbly mortified by my behavior.

2 I apologize, first and foremost, to all persons and
3 their families victimized by my actions as well as to my
4 family, friends, former coworkers, and veterans for any
5 pain, embarrassment, shame, breakdown of trust that my
6 behavior has caused.

7 I recognize that the relentless sharing of images such
8 as these perpetuates the victimization of each human being
9 involved. And for my participation in that activity, I am
10 humiliated and I am truly sorry.

11 Your Honor, my life has not been all about my
12 offenses. I wish to communicate to this Court that you not
13 perceive me as such. I know that I have a problem. I have
14 tried to abstain from this behavior.

15 To make up for any wrongdoings, I have tried to better
16 myself and better those around me. I earned my bachelor's
17 degree at the age of 61. I have done volunteer work to help
18 those less fortunate, trying to make amends. This includes
19 serving as an elder, a lector, usher, a Eucharist minister
20 with my church, as well as serving as a volunteer with the
21 Cuyahoga County Animal Shelter, Wheels on Meals, Habitat for
22 Humanity, WVIZ Public TV, Harvest For Hunger, and the
23 Combined Federal Campaign.

24 Your Honor, I genuinely do wish to obtain treatment by
25 participating in the RDAP program as well as any sex

1 offender treatment program deemed suitable by the Court.

2 I wish to participate in 12-step programs offered by
3 Life Recovery, and SLAA, Sex and Love Addicts Anonymous.

4 Upon release, I plan to reconnect with the services
5 offered by the Veteran's Administration to continue my
6 counseling and treatment.

7 My primary goal is to help others, especially
8 veterans, who suffer from pornography addiction.

9 Your Honor, I wish, through counseling, treatment, and
10 accountability, to effect a sincere and permanent change in
11 my lifestyle, never to engage in these shameful and damaging
12 activities again.

13 Thank you.

14 THE COURT: Thank you, sir.

15 Counsel for the government, what's the government's
16 position regarding this matter, please?

17 MS. SKUTNIK: Thank you, Your Honor.

18 I know that this Court has had the opportunity to
19 review the government's sentencing memorandum, and I have
20 tried to give a very thorough picture to this Court of what
21 the government is aware of as it relates to Mr. Richards'
22 history and characteristics as well as the facts of the case
23 before this Court today.

24 Your Honor, I would submit to this Court that Mr.
25 Richards is the poster child for 240 months; that he is the

1 poster child for the maximum sentence in this type of case.

2 This is a sentencing for the charge of receipt and
3 distribution of child pornography. And counsel for the
4 defense tries to distinguish this case, to minimize this
5 case, and to minimize the prior behavior of Mr. Richards.
6 And I would just like to make a few, hopefully brief,
7 remarks as it relates to that.

8 First of all, this Court has in the past and has today
9 expressed a rejection of a wholesale dismissal of the
10 guidelines. I simply want to point out a couple of
11 important things.

12 When law enforcement works these cases -- and I have
13 worked along with them and I have reviewed these images that
14 they have discovered on computers. I have watched the
15 categories that they have marked. There is a category that
16 they mark that's "suspected child pornography" when,
17 according to case law, they do the same thing a jury would
18 do, they look at the image and they try to determine if they
19 can establish that that minor depicted in the image or the
20 video is in fact somebody who is under the age of 18
21 pursuant to the federal definition.

22 A child that is prepubescent is fairly easy to
23 recognize and fairly easy to acknowledge and to count with
24 significant confidence as a minor. And so those images are
25 readily marked as suspected child pornography because the

1 child has minimal development, unlikely to have pubic hair,
2 and minimal breast development or development of the
3 genitals.

4 What gets far more difficult are images of a child
5 that has begun to go through the process of puberty. And so
6 what you frequently find in these cases are categories of
7 either "age difficult" or what they call "child erotica."
8 And those are images that they cannot neatly place into that
9 little bin.

10 And so, of course, you will see the frequency of the
11 enhancement for prepubescent because if I don't have a known
12 victim of a postpubescent child, it is very difficult to
13 bring a case with evidence beyond a reasonable doubt that
14 that is in fact a minor.

15 And so that is a law enforcement technique and
16 strategy, and it makes sense that that is what you would see
17 in these enhancements because that's how we engage in our
18 investigations.

19 The other thing that I would point out is I have
20 prosecuted many, many cases that were being brought by the
21 United States Postal Service of people who had received,
22 still to this day, child pornography through the United
23 States mail. That is a case that does not involve the use
24 of a computer.

25 And in fact, and frankly, the introduction of the

1 Internet and computers has blown this industry exponentially
2 and the harm to the children exponentially. And the fact
3 that that only counts for two levels really to me seems to
4 minimize the effect of the Internet on these poor victims
5 whose images now reach all of the corners of the earth.

6 The other thing that I would simply point out on that
7 argument is that the guidelines for child pornography
8 offenses are artificially low. The base offense was set at
9 a 22 which is artificially low such that when you add two
10 levels for prepubescent minor and for use of a computer you
11 only get to a 26 which puts us at or around the mandatory
12 minimum term for these types of offenses.

13 Moving on, Your Honor, from that, I would like to
14 focus a little bit more on some of the remarks that were
15 made about the size of the defendant's collection in this
16 case.

17 So still sticking with and focusing on the facts in
18 this case, the indication and the argument to this Court is
19 that the number of images possessed or that was in the cache
20 of Mr. Richards' collection is small and that we have seen
21 many, many other cases where the numbers are far larger.

22 And if this was Mr. Richards' first time that he ever
23 appeared before a court, if he was never before a court
24 before for matters concerning child pornography, that may be
25 a more valid argument.

1 But what do we know about Mr. Richards? Well, we know
2 that it wasn't his first foray into the criminal justice
3 system.

4 I also indicated in my sentencing memorandum and point
5 out that the defendant admitted that in 2012, the Ohio ICAC
6 knocked on the exact same door, put him in the exact same
7 van, or a van, I should say, very much identical to the van
8 that he was interviewed in in connection with this case
9 because they had probable cause to execute a search warrant
10 at his home, to suspect that he was engaged in child
11 exploitation behavior, child pornography.

12 And Mr. Richards proudly professed to law enforcement
13 that ICAC didn't find anything on his computers. And there
14 were no images that were found.

15 I reviewed that interview. I watched his same
16 sheepish presentation. Woe is me. I'm so sorry. Somebody
17 reached out to me. They wanted me to do a tribute photo.
18 And I simply shut down that communication and I stopped
19 speaking with them, and that was the end of that, which is
20 not entirely true.

21 But the fact of the matter is, law enforcement knocked
22 on his door in 2012. And so Mr. Richards has learned from
23 that experience. What Mr. Richards has learned is that when
24 law enforcement comes knocking on your door with a search
25 warrant in connection with child pornography, they're going

1 to look at your computer devices. They're going to get in
2 there. They're going to find what's in there. They're
3 going to find your search history. They're going to find
4 the images that you have saved.

5 Last time he had successfully deleted all material.
6 This time he went a different route. He didn't store child
7 pornography the way that many of what I would now consider
8 less experienced offenders do. He didn't place it on
9 external hard drives. He didn't put it on disks or CD's.
10 And frankly he didn't store it in nice little file paths on
11 his computer the way that some folks do because he knew that
12 he had a never-ending supply of child pornography when he
13 got on that website.

14 When he got on that website, there was like-minded
15 individuals who were sharing links of child pornography that
16 he could access without storing them and downloading them to
17 his computer where he could get caught.

18 The other thing that counsel says is, well, Mr.
19 Richards immediately admitted his behavior in this case. He
20 was forthcoming. He was honest. And he gave a full
21 confession.

22 And, Your Honor, I would submit to you that that is
23 because as Mr. Richards sat in that van that day, he knew
24 that there was law enforcement in his house that were
25 seizing his devices, that would forensically review them,

1 and they would find that material.

2 So I don't think he should get a whole lot of credit
3 for saying, you know, yes, you will find child pornography
4 on my computer when you know darn well that forensically
5 that's exactly what they're going to do, and also because
6 they told him that they were there because they had evidence
7 that he had been engaged in child exploitation behavior.

8 And so when you couch what he did and what he said and
9 how he behaved in the much bigger picture, it's not really
10 much of an argument in his favor.

11 The other thing I would say is that he lied to the
12 agent. The agent repeatedly pressed him. And he told this
13 agent that the only reason why he pled guilty to the gross
14 sexual imposition case was to get it over with and basically
15 to spare anyone from having to testify.

16 And then it wasn't until later when he was polygraphed
17 that he ultimately admits that he was engaged in some type
18 of sexual touching of his daughter and others which at least
19 would be more consistent with the plea that he entered into
20 in the prior gross sexual imposition, sexual imposition
21 cases.

22 The defense counsel submits to this Court that Mr.
23 Richards has a history of approximately 30 years. And if I
24 do the math, it looks more like 38 years.

25 He submits to you that you should consider his service

1 to the United States as a mitigating factor. I would submit
2 to you that during his service, he exploited children
3 overseas.

4 And what really sticks out in my mind about his
5 description of those offenses that I have included in my
6 sentencing memorandum on page 7, referencing activity in the
7 Philippines, is this statement. He said, "None of my sexual
8 contact with these minors was nonconsensual."

9 Talking about 12 to 14 year old girls, "none of my
10 sexual contact with these minors was nonconsensual," as if a
11 child of that age in those conditions could consent to the
12 sexual activity described.

13 That's just the beginning. That's just what we know.
14 That's the tip of the iceberg, I would submit to this Court,
15 that we know about what has transpired over the nearly 40
16 years of Mr. Richards' access to children in the community.

17 The incident that occurred in the mall is incredibly
18 troubling for so many reasons. And again, Mr. Richards says
19 to you, Your Honor, I want treatment. And I say BS, because
20 you had an opportunity to have treatment.

21 After he got caught in the mall, he could have sought
22 treatment. He had the resources. He had the ability to do
23 that. He had an opportunity to seek treatment after his
24 conviction.

25 There is no indication that he received treatment as

1 part of --

2 THE COURT: Just to be fair, I think he did,
3 according to the report, have some sort of treatment while
4 he served his state sentence.

5 I just -- again, I want to be sure that we
6 don't -- probation staff might be able to point me to that
7 paragraph, but I seem to recall that he did receive, or
8 there was some effort made.

9 And I know treatment options are limited, and I don't
10 know whether it was part of his ten years of post -- or
11 parole, whether they, they meaning the state, ordered
12 treatment for him as conditions of his sentence back in the
13 time frame in question.

14 I know I read it somewhere. Or at least I believe I
15 did.

16 Am I mistaken, or did I miss it here? I'm sorry to
17 interrupt your presentation, but I think it's an important
18 point.

19 MS. SKUTNIK: Your Honor, I'm reviewing paragraph
20 31 which speaks of his prior conviction. I don't see it
21 there. And I'm also reviewing paragraph 48 which is the
22 category of mental and emotional health, and I don't see it
23 referenced there.

24 I'm not sure if there was -- I don't recall there
25 being something in defendant's memorandum to that effect.

1 THE COURT: Did you locate any information?

2 THE PROBATION OFFICER: Your Honor, all I'm aware
3 of is the stuff at the VA for his depression.

4 THE COURT: All right. Perhaps I was in error
5 then.

6 I'm sorry. Go ahead, counsel, if you would like to
7 finish your argument. I apologize for interrupting. I'll
8 continue to look and see if I might have located it
9 somewhere in the report.

10 I would be surprised if the state system, with a
11 17-month sentence, if he was afforded any treatment in
12 custody. But that's a different matter.

13 MS. SKUTNIK: And frankly, Your Honor, I can
14 argue that both ways. He either didn't receive treatment,
15 or if he did as part of a court-ordered period of
16 supervision to follow his incarceration, what it indicates
17 to me is that it was not successful because Mr. Richards has
18 a profound and prolific sexual attraction to prepubescent
19 female children and one that was not curtailed, if he did
20 receive treatment, or that he wasn't honest about when he
21 received treatment because, frankly, if you're not
22 forthcoming, it's garbage in, garbage out.

23 And we know that as early as 2012, he had another
24 knock on his door. He had another opportunity to try to
25 arrest the beast, to receive help.

1 But when I look at the discussion of him receiving
2 mental health services from the VA, it says nothing about
3 trying to deal with a sexual attraction to children. It
4 talked about relationships with his daughter and
5 difficulties sleeping at night.

6 So it's hard to accept as genuine that now, 38 years
7 later, we're still listening to, oh, I'm profoundly sorry.
8 Please accept my apologies. I want help. I'm so sad.
9 Because the defendant has never taken sincere steps to
10 arrest his behavior and to curtail the harm that he causes
11 to our children.

12 Your Honor, I know, again, I've probably gone longer
13 than I had originally intended. But it is so rare that I
14 stand here before the Court with so many things to argue
15 that in my mind, under the 3553(a) factors, warrant the
16 maximum sentence, which in this case is 240 months. But I
17 believe that that is what this case calls for, and I submit
18 or request that that is the sentence of the Court.

19 Thank you.

20 THE COURT: Thank you, counsel.

21 Anyone else? Mr. Lazarus, anything else you would
22 like to add?

23 MR. LAZARUS: Your Honor, just to go to the
24 Court's question that Mr. Richards, while he was in the
25 state prison in Madison Correctional, he did do sex offender

1 treatment while incarcerated. And then while on post
2 release control he was receiving treatment in the community.

3 THE COURT: Is that something in your brief? Is
4 that where I found it, or is that something you're just
5 calling to my attention now?

6 MR. LAZARUS: The part of Madison Correctional is
7 on page 20 of my brief.

8 I don't believe him receiving treatment is in my
9 memorandum.

10 I have the same recollection as you. I know I saw it
11 somewhere. I just can't remember exactly where.

12 THE COURT: Makes me feel better that I just
13 didn't pull it out of thin air.

14 In any event, the Court would note for the record I've
15 carefully considered the matter. It's an extraordinarily
16 difficult case as most, if not all, of these are. And I
17 will set forth the reasons for the Court's sentence.

18 We begin with the nature and circumstances of the
19 offense. The defendant is before the Court having pled
20 guilty to receipt and distribution of visual depiction of
21 minors engaged in explicit conduct.

22 In 2017, using the online name She's Ten and another
23 name that I won't read into the record, given the nature of
24 it, the defendant distributed at least 29 images depicting
25 child pornography through an Internet based chat room.

1 During a search of his residence in February of 2018,
2 agents located a computer that contained 342 child
3 pornography images, 18 video files depicting child
4 exploitation.

5 The defendant admitted possessing the aforementioned
6 material and distributing child pornography images through
7 an Internet chat room.

8 And we'll talk about it more later, but the defendant
9 gave an extensive and detailed statement outlining the
10 nature and circumstances of the offense as well as a great
11 deal of information about his prior history and other
12 matters that are, of course, relevant.

13 And I will incorporate by reference, as we had some
14 discussion earlier, the report from Homeland Security. The
15 defendant's statement is remarkably candid and sets forth a
16 great deal of materials about his prior history and his
17 sexual interest in children.

18 The history and characteristics of the defendant.
19 He's 61 years old. He was adopted as an infant, reared by
20 his adoptive parents in Toledo, Ohio.

21 He had some difficulties, according to the defendant's
22 sentencing brief or memorandum, I believe, some difficulties
23 as a student in the school system. I believe he was in a
24 Catholic school, if I'm not mistaken, according to the
25 briefing by the defendant, and had difficulties as a

1 student.

2 And after graduating high school, he enlisted and
3 served in the U.S. Navy for 20 years before obtaining a job
4 as a human resources representative in our probation office
5 in Cleveland, Ohio.

6 He eventually lost that job as a result of his
7 conviction for gross sexual imposition against his
8 prepubescent daughter in 2006.

9 After completing a 17-month term of incarceration, Mr.
10 Richards worked in multiple restaurants before most recently
11 obtaining a human resources job at the Veteran's hospital in
12 Cleveland.

13 In 2017, he earned a Bachelor's degree from Notre Dame
14 College of Ohio, and months later he was arrested for the
15 instant offense.

16 Mr. Richards has two children, one of who was the
17 victim of his first sexual offense conviction, and the other
18 child that he never met as a result of his restriction of
19 being around minors.

20 Prior to his arrest, he did pay child support for his
21 younger daughter.

22 His older daughter is estranged from her father based
23 upon the earlier events in question, but most recently this,
24 obviously these charges and convictions, have further
25 estranged the parties. And she is, of course, not

1 communicating with her father because of this matter.

2 The defendant is a criminal history category II as a
3 result of accumulating three criminal history points for a
4 prior sex conviction in 2006.

5 In that case Mr. Richards engaged in sexual contact
6 with his biological daughter when she was between the ages
7 of 7 and 13 by repeatedly touching her in various areas of
8 her body, her buttocks, her breasts, and thigh areas,
9 according to his daughter.

10 Their family has reason to believe the defendant has
11 possibly committed other unverified sexual offenses against
12 children that was never reported to law enforcement
13 authorities. Notably against a prepubescent child in the
14 '80s and against a niece in 2002.

15 Just so it's clear for the record, I will take these
16 allegations with a grain of salt. Obviously they are
17 allegations. And so I, again, will note for the record, as
18 I have mentioned the earlier allegations made by the
19 defendant's ex-spouse, that obviously they are allegations
20 and they are currently part of the report. And so I will
21 accept them as that.

22 However, that being said, the allegations as set forth
23 do not appear to be as farfetched as one might think. And I
24 think perhaps the most probative or more probative
25 information that I have is the defendant's own statement.

1 And we can discuss that further, but the defendant, by
2 his own admission, indicates that he had a sexual attraction
3 to girls between the age of six and twelve.

4 And he said, "Prior to 2005 when I had the GSI
5 conviction, or incident, my daughter would bring over
6 girlfriends to our residence. At times I did find some of
7 these girls to be sexually attractive. I did use them for
8 masturbatory fantasies." And he indicated that he engaged
9 in that conduct more than 50 times to various friends.

10 So it is not farfetched, unfortunately, to believe
11 this defendant, with this unfortunate sickness, the desire
12 for these children -- again, these other incidents, again,
13 it is not too farfetched to believe that he may have engaged
14 in the conduct.

15 And I don't use that as a specific basis of the
16 Court's sentence, but, you know, his statements are, again,
17 the most important part of assessing those matters.

18 As far as the sentencing disparities, defendants with
19 similar records and conduct, there is the U.S. Sentencing
20 Commission compiles sentencing data comparing offenses in
21 each of the six criminal history categories. The data for
22 this defendant's offense of conviction for fiscal year 2017
23 is as follows:

24 The national sentences for individuals with a criminal
25 history category of II who are convicted of child

1 pornography offenses is 190 months.

2 Considering that the instant offense involves the
3 defendant's second sexual offense conviction in 12 years,
4 the probation officer has recommended a sentence about or
5 above -- I should say about the national average is the best
6 to ensure public safety.

7 And the guidelines and the sentencing disparities are,
8 again, based upon in many ways various judges around the
9 country varying for various reasons.

10 And so I think that in many ways we have wide-ranging
11 disparities because of the views, the differing views of
12 various judicial officers regarding the child pornography
13 guidelines.

14 Before I turn to the need for the sentence imposed,
15 I'm required to address, and I will address, the arguments
16 that have been raised by counsel for the defendant in terms
17 of trying to decide a sentence. And so I want to
18 acknowledge the arguments that have been made by the
19 defendant for any reviewing court. I'll note that I'm going
20 to try to address each in turn, given the numbers and the
21 volume of those arguments.

22 Counsel for the defendant, you can correct me if for
23 some reason I don't address each argument that you've
24 raised.

25 I'll address the general argument regarding the

1 guidelines and whether the inherent flaw is in the child
2 pornography guidelines. Again, I will adopt my own view,
3 and I've written other opinions on these issues.

4 I think at least for the most part the guidelines are
5 appropriate in these type of cases. And I don't believe
6 that, particularly in this type of case, the guidelines are,
7 the use of the guidelines is inappropriate. And I do not
8 disagree with them on policy grounds or policy reasons.

9 And I say that for several reasons. Even with the
10 guidelines, we do have the ability to vary based upon the
11 various 18:3553(a) factors. I've used that in the past. I
12 will continue to use that.

13 In those cases where I think the guidelines are
14 excessive or greater than necessary, then I will obviously
15 exercise that discretion.

16 But as a policy matter, I think the guidelines are an
17 appropriate starting point. As a policy matter, I think we
18 owe it at least -- and I will not comment on other jurists.
19 They're free to do as they wish. I think my duty is to
20 apply the statute, apply the law.

21 And I think in this case, these type of cases, the one
22 thing that we continue to miss and that jurists continue to
23 miss, yes, we need to consider the history and
24 characteristics of the defendant, their background and their
25 experience.

1 But I think far too often, as I've said in the past,
2 we sanitize these images because we describe them in detail
3 in our reports. But they are sanitized images. We talk
4 about sadomasochistic conduct or pictures or images. We try
5 to attach big terms and big words to these pictures.

6 These are the pictures of little children at the worst
7 moment of their lives. And make no mistake, these
8 are -- many of these cases, these are little children.

9 Instead of focusing on the offender, we also need to
10 add balance, as judges, to the focus on the victims. These
11 victims, as I have the victim impact statements, these are
12 victims that have been, their pictures were taken, some of
13 them, many years ago. They continue to be victimized,
14 constantly victimized, because their images are out there on
15 the Internet.

16 And when you say the use of a computer is in every
17 case, well, yes, it is. And the use of the computer is
18 extremely damaging. It's harmful. It is what makes these
19 types of cases so prolific, and why we have so many is
20 because we have the Internet and the ability to worldwide
21 share these images, and because worse than that, the victims
22 are victimized over and over and over.

23 It's not like a bank robbery where the bank teller is
24 robbed and she, of course, is terrified because the robber
25 may have a gun. And that passes, and she may be able to

1 seek counseling and that is a one-time occurrence. In these
2 cases, these children are continually victimized.
3 Continually victimized.

4 So as a jurist, I don't disagree. I have a policy. I
5 think the guidelines are appropriate. My policy is that we
6 need to send a very strong message to individuals -- this is
7 individual-type sentencing -- that these type of cases need
8 serious consideration, and that lengthy sentences are most
9 frequently needed in these kind of cases because individuals
10 that in some way, shape, or form, as in this defendant, even
11 worse than others, obtain sexual gratification from watching
12 children -- and I say this because that's frequently what
13 they are -- little babies and children being raped. Those
14 people are dangerous individuals in the community. And they
15 need to be incarcerated. They need to be deterred. And
16 then they need to receive treatment once they are released
17 back into the community.

18 And then returning to this particular case, the
19 defendant, of course, having addressed the guidelines, I
20 acknowledge the defendant had a difficult upbringing. He
21 was adopted and raised by adoptive parents. And I think he
22 had challenges as a child. And I acknowledge that and the
23 possible abuse and his difficult challenge.

24 I acknowledge his military career. And sadly, I hate
25 to -- again, his military career, I acknowledge his service

1 to the country, but tragically, as he self-reported, his
2 interest in children began while his service to the country
3 was ongoing, began with children in the Philippines, 12 to
4 14, and that is where this all began.

5 So those are, again, all those things have to be taken
6 into consideration.

7 I acknowledge the defendant has issues regarding
8 depression and other described illnesses as set forth in the
9 report. It appears he received psychiatric services.
10 Unfortunately, he did not, at least based on what we know so
11 far, did not make a full disclosure on his attraction to
12 children and the issues that are most severe and most
13 compelling that bring him here today.

14 One might have hoped, Mr. Richards, you might have
15 done that in the past. You are and were unbelievably candid
16 about your interest in children and your prior sexual
17 history involving children. And the fact that you do
18 receive gratification from the mere touch, the way I read
19 this report, I read your statement, these children, as they
20 pass you in the restaurants and other places, even that type
21 of contact with these children apparently triggers your
22 desires. And that makes this case, again, even more
23 difficult.

24 The arguments for a variance -- candidly, I've looked
25 at this report. The argument about a variance for his

1 military service, a variance based upon his employment, you
2 know, I acknowledge that. But then there is the other side
3 of the equation, the double life, this activity and these
4 children.

5 And the guidelines, as I've already talked about, and
6 as I've used in the past, will continue to use, I think it's
7 important, the report to Congress by the Sentencing
8 Commission, I know it's somewhat dated now, 2012 was the
9 report, much of it continues to remain relevant in my view.
10 Much of it is important.

11 And the three characteristics we talked about earlier,
12 the content of the offender's child pornography collection,
13 the nature of it, the types of sexual conduct depicted in
14 the images, the ages of the victims, the extent to which the
15 offender has organized and maintained his collection over
16 time, the degree is number one. Number two, the degree of
17 the defendant's engagement with others, the Internet
18 community. And then the history of engaging in sexually
19 abusive exploitative or predatory conduct. And all three of
20 those weigh against the defendant.

21 His collection is such as described in the report. It
22 is a collection. Yes, we see substantially more. But the
23 nature of the collection speaks for itself. I won't
24 describe it, but it certainly does not work to the
25 defendant's benefit.

1 In terms of his engagement with other offenders, we
2 know he's involved in chats and chat rooms, and that makes,
3 again, that is an indication that this is not -- this is an
4 individual who is clearly interested in not only child
5 pornography but children.

6 His use of the names, the chat names of She's Ten and
7 Kid -- pardon me -- but Kid Cunt for the use of his current
8 Snapchat user names, according to the current case title,
9 and so the use of one or both of those names obviously gives
10 you some indication of the defendant's interest.

11 So I struggled to find a reason why the mandatory
12 minimum is not appropriate here. And, again, I would point
13 to any reviewing court the most compelling is the
14 defendant's own statement which is completely forthcoming.

15 I don't know if that's a cry for help or what it might
16 be, but his own self-admitted interest in children between
17 the ages of six and twelve and his self-admitted prior
18 conduct involving these children, again, make this a very
19 extraordinarily difficult case for Mr. Richards and his
20 attorney.

21 As far as the need for the sentence imposed, just
22 punishment, adequate deterrence, protect the public, improve
23 the offender's conduct and condition, the defendant has a
24 history of sexually inappropriate conduct dating back many
25 years. He's allegedly committed various uncharged sexual

1 offenses against strangers in the mall and minor relatives
2 at family gatherings.

3 And, again, I make that reference, although, again,
4 that evidence, that reference in the PSI is given much less
5 weight than the defendant's own admissions.

6 We do have, it's unrefuted, his conviction of multiple
7 counts of gross sexual imposition against his prepubescent
8 daughter. He was incarcerated for 17 months, released in
9 2007.

10 The government does call to our attention -- it's in
11 their brief; it's unrefuted -- that there was this incident
12 in 2012 where agents interviewed Mr. Richards. One would
13 have hoped that that would have triggered some concern on
14 his part. But he was incarcerated. And then less than ten
15 years after, this in 2007, the GSI, he was incarcerated.
16 And then he was arrested for this conduct, the instant
17 matter involving the defendant using peer-to-peer file
18 sharing programs to receive and distribute numerous picture
19 and video files of prepubescent children being sexually
20 abused on the Internet.

21 And again, it's a challenge. Mr. Richards, I wish
22 things were different. It is really a difficult case
23 because of your history and your self-admitted ongoing
24 interest in children.

25 I have a duty to protect the public and afford

1 adequate deterrence, and this is a serious offense, and
2 these are serious offenses. But more importantly, your
3 history and characteristics and your ongoing attraction to
4 children make this so challenging.

5 And with all due respect, the Court will do the
6 following: Pursuant to the Sentencing Reform Act of 1984
7 and 18 United States Code 3553(a), it will be the judgment
8 of the Court the defendant, David Richards, is committed to
9 the custody of the Bureau of Prisons for a term of 230
10 months.

11 I'll set aside the ten months. I know there is a good
12 argument to be made under most circumstances for the
13 statutory maximum. And for the reasons only that the
14 defendant did serve in the military for some period of time
15 and also served the VA, and his education that he has earned
16 over that period of time deserves some small consideration.
17 And that will be the consideration that I provide.

18 When you're released from prison, you'll be placed on
19 supervised release for the rest of your life. I believe
20 based upon the statements of the defendant, his ongoing
21 interest in children, a mandatory period of life is
22 certainly called for.

23 And as it relates to the term of supervision, I would,
24 once again, refer to the defendant's own statement as to his
25 interest with children as well as his prior GSI. The

1 supervision will be needed and necessary.

2 I'll waive the fine.

3 The special assessment of \$100 is due immediately.

4 And then all the mandatory and standard conditions
5 adopted by the Court in Part D will be put in place.

6 You must refrain from the unlawful use of a controlled
7 substance, submit to one drug test within 15 days of being
8 released from prison, and to at least two periodic drug
9 tests as determined by the Court.

10 I will recommend the RDAP program. The defendant may
11 have issues with alcohol and drugs. And so -- particularly
12 alcohol, so we'll make the recommendation. Any type of
13 treatment the defendant can receive would be to his benefit.

14 You must participate in the sex offense specific
15 assessment. It's my order that when the defendant is
16 released, if not sooner, and hopefully the Bureau of Prisons
17 will become more -- or has become more advanced, the
18 defendant will receive a very detailed assessment and
19 psychiatric evaluation regarding his issues to determine
20 what if any treatment conditions can be put in place.

21 You're required to participate in any treatment
22 program as to substance abuse, alcohol, what have you.

23 And the testing will be put in place. You can't
24 tamper with that testing, that efficiency of that testing in
25 any way.

1 And bear in mind, sir, you cannot possess, use a
2 computer or electronic device or data storage devices or
3 media without the prior written approval of your probation
4 officer.

5 And your computers may be subject to a search as,
6 again, a computer search, and that search will be consistent
7 with the search and seizure provisions we put in place.

8 Your property, house, residence, vehicle, papers,
9 computers, any electronic communications or data storage
10 devices or media may be subject to a search conducted by
11 your probation officer.

12 Failure to submit to a search may be grounds for
13 revocation of release. And you must warn other occupants
14 that the premises may be subject to a search pursuant to
15 this condition.

16 You'll be required to cooperate and register under the
17 Adam Walsh Act. And that is something similar, sir, to what
18 you did when you were, I think for ten years, after you were
19 released on the GSI. You'll be required to register under
20 the sex offender registration act, notification act,
21 sometimes called SORNA. Keep your registration current in
22 each jurisdiction where you reside.

23 And no later than three business days after each
24 change in name, residence, employment or student status
25 appear in person in at least one of those jurisdictions and

1 inform the jurisdiction of all your changes. And as you
2 approach your release date, I'm sure you'll be reminded. If
3 you fail to -- if you violate or do violate, I should say,
4 that condition, that could be a new federal offense
5 punishable by up to ten years.

6 You may not possess or view any visual depiction,
7 including any photograph, film, video, picture, computer or
8 computer-generated image or picture, whether made by or
9 produced by electronic, mechanical, or other means, or
10 sexually explicit conduct.

11 And most importantly among all of this is that you
12 will participate in a sex offense specific treatment
13 program, follow the rules of that program. And you will be
14 supervised. You cannot access the Internet except for
15 reasons given by your probation officer.

16 Your computer will be monitored, and you must allow
17 software monitoring to be installed on your computer.

18 And you must allow the probation office to conduct
19 periodic and limited searches of that computer. And
20 that -- to determine whether, again, there has been any
21 problems or issues with that computer monitoring.

22 You cannot have contact -- again, this will trigger a
23 violation, I'm sure you understand. You cannot seek,
24 obtain, maintain any residence, employment, volunteer work,
25 church, recreational activities involving minors, persons

1 under the age of 18, in any way without the prior express
2 written approval of your probation officer.

3 You can't reside in direct view of schoolyards, parks,
4 public swimming pools, playgrounds, youth centers, video
5 arcades, or other places primarily used by persons under the
6 age of 18.

7 And you can't loiter around any schoolyards, within
8 100 feet of schoolyards, playgrounds, theme parks, arcades,
9 swimming pools, skating rinks, toy stores, other places
10 where people under the age of 18 congregate or gather
11 without the approval of your probation officer.

12 And your residence and employment must be approved by
13 your probation officer. Any change in that must
14 be -- again, those residence, employment must be approved by
15 your probation officer. And you need to give your probation
16 officer notice of those changes at least 20 days prior.

17 And you cannot reside within 1,000 yards -- or 1,000
18 feet of any school or daycare center without the express
19 approval of your probation officer.

20 And given the circumstances here, you must consent to
21 enhanced extensive home inspections which include examining
22 under beds, mattresses, cabinets, closets, drawers, trash
23 containers, other personal spaces to make sure that there is
24 no child pornography in those premises or in those
25 whereabouts, those areas.

1 Counsel for the government, any objections,
2 corrections, any arguments that have not been previously
3 raised under *Bostic* that I can address?

4 MS. SKUTNIK: Your Honor, no objections to the
5 sentence. I would direct the Court's attention to the
6 additional special assessment pursuant to 18 United States
7 Code Section 3014 that does apply to child exploitation
8 cases within the time frame of the defendant's case.

9 THE COURT: All right. Thank you.

10 We will assess the \$5,000. And hopefully the
11 defendant -- obviously during his period of incarceration,
12 ten percent of his -- or 25 percent of what he may earn may
13 be applied to those items, I would suspect, would be the
14 method, manner, and means of perhaps paying that special
15 assessment.

16 Counsel for the defendant, do you have any objections
17 under *Bostic*?

18 MR. LAZARUS: Your Honor, first of all, we would
19 object to the length of the sentence.

20 But as to the special assessment of \$5,000 under that
21 3014, if the Court makes a finding that he is indigent, the
22 Court can waive that fine.

23 Mr. Richards cannot afford counsel. He has no money.
24 He has been incarcerated and has no income. So we would ask
25 that the Court waive the \$5,000 special assessment.

1 THE COURT: Well, the special assessment, as I
2 understand it -- both sides can enlighten me if you would
3 like -- is designed to compensate the victims of these type
4 of offenses.

5 Am I correct?

6 MS. SKUTNIK: Correct, Your Honor.

7 THE COURT: And we have in this case, attached to
8 the government's sentencing memoranda, we have victim impact
9 statements from victims who were part of this case whose
10 pictures are available on the Internet. They're part of
11 these various collections that make the rounds.

12 So I recognize the defendant is indigent. That does
13 not mean that I cannot impose it, as I understand it. That
14 I can impose it. And then the Bureau of Prisons can assess
15 it as against any earnings he might have, given the length
16 of his time of incarceration.

17 Am I mistaken? Again, I understand that I have some
18 discretion, but it's a special assessment. The same applies
19 with the \$100 special assessment. It's a bit different, but
20 either side care to enlighten me?

21 MR. LAZARUS: Your Honor, we would just say that
22 if we are talking about money that goes to the victims,
23 that's what restitution is for. There has been no
24 restitution claims.

25 But the Court does have discretion as to whether there

1 is a finding of indigency. And if there is a finding of
2 indigency in this case, the Court can waive that fine.

3 THE COURT: Is the defendant going to continue to
4 receive his VA disability? He has got a pension. He is on
5 disability. Will he continue to receive that disability
6 while he is incarcerated?

7 MR. LAZARUS: It's going to be reduced once they
8 reassess it.

9 THE COURT: Reduced in what amount? Is he going
10 to continue to receive money is the question?

11 MR. LAZARUS: He will receive some money, but it
12 won't be the same amount that he has been receiving. We
13 don't know how much it will be reduced.

14 THE COURT: How much will it be?

15 MR. LAZARUS: We are not sure at this point.

16 THE COURT: Well, then I'll defer until such time
17 as you provide me with pertinent information about two
18 things. Number one, about the amount of disability he will
19 receive. Number two, whether he has any current ongoing
20 child support obligation. I think, according to the PSI, he
21 was paying \$536 a month toward child support.

22 So the question is, first of all, is he going to
23 continue to receive a benefit while he is incarcerated from
24 the VA? And what amount?

25 And then what other obligations does he have as it

1 pertains to child support?

2 So if you provide me that information, then I will
3 make a final decision as to the special assessment.

4 Is that agreeable, counsel for the government?

5 MS. SKUTNIK: Yes, Your Honor.

6 THE COURT: And I am referring to the specific
7 \$5,000.

8 Counsel for the defendant?

9 I'm sorry. I stand corrected. I should pull up the
10 PSI. It's called Justice For Victims of Trafficking Act.
11 So, again, that is what we are discussing here.

12 So, counsel, do you have any objection to proceeding
13 in that fashion before I make a final decision?

14 MR. LAZARUS: How would you like us to inform
15 you?

16 THE COURT: Well, your client worked for the VA
17 in the human resources department. Hopefully there is
18 someone there who either you can reach out or he knows who
19 you can discuss with them what will be the consequence now
20 that he has been sentenced, what will be the effect on his
21 disability. And then you can reach out to opposing counsel,
22 maybe come to some agreement. If you can't, then I'll be
23 glad to, again, hear from you and to allow you to provide me
24 the information.

25 You say he is indigent. He may be indigent, but if he

1 has continuing monthly income while he is incarcerated,
2 that's, I think, relevant to whether or not I should impose
3 the \$5,000. I think it's also relevant if he has another
4 obligation. I'm repeating myself a bit. If he has child
5 support that's continuing on, then that child support
6 deserves and needs the support which he is responsible for.
7 And that might have a bearing on whether the \$5,000, whether
8 I defer the 5,000 as opposed to making sure the income money
9 goes to the child, support of the child.

10 Do you have any questions, sir?

11 MR. LAZARUS: Me or Mr. Richards?

12 THE COURT: Either one. If Mr. Richards knows,
13 he can tell us now. Then we can go ahead and decide.

14 MR. LAZARUS: No. I discussed it with him. He
15 doesn't know.

16 THE COURT: What is his current monthly benefit?

17 MR. LAZARUS: We'll have to look into it.

18 THE COURT: I mean, has it been accruing since
19 you have been incarcerated?

20 THE DEFENDANT: Child support, Your Honor?

21 THE COURT: I assume the child support is coming
22 directly out of your check.

23 THE DEFENDANT: Yes, Your Honor, it does.

24 THE COURT: So why don't you find out how much
25 it's going to be reduced. It may not be reduced at all if

1 the money is going directly to child support.

2 I want to be fair to both sides before I decide
3 whether to impose it or not. I want to be sure if you have
4 the ability to pay it from your disability benefit while
5 you're incarcerated, then that is something I will consider.
6 If you have child support obligations that will eat up most
7 of your benefit, then that's a different matter.

8 How old is the child, the youngest child? Refresh my
9 memory.

10 THE DEFENDANT: Thirteen, Your Honor.

11 THE COURT: So you have another five years of
12 support for her.

13 So let's find out the answer to those questions, Mr.
14 Lazarus, and then we will put up a final order either
15 granting the government's request or denying it subject to
16 the child support, all right.

17 Is that acceptable?

18 MR. LAZARUS: Yes, Your Honor. We'll do our
19 best.

20 THE COURT: Mr. Richards, you have a right to an
21 appeal filed from the Court's sentence. I'm sure Mr.
22 Lazarus will advise you. We will put up an order setting
23 forth your offense. You'll be provided the transcripts, all
24 the necessary papers. We'll appoint an attorney for
25 purposes of the appeal. We'll make certain that, again, you

1 have all that information.

2 And again, the other closing comment I would make,
3 sir, with all due respect, you have a serious problem, a
4 serious issue. And hopefully at some point, again, you'll
5 be able to receive treatment.

6 I know there is a treatment program in the Bureau of
7 Prisons. Unfortunately, that program, typically you don't
8 qualify until later on in the term of your sentence.

9 But hopefully you'll receive a very thorough
10 evaluation, and then a treatment plan can be put in place.

11 Thank you very much.

12 MS. SKUTNIK: Your Honor, two matters.

13 THE COURT: Yes.

14 MS. SKUTNIK: First is that the government would
15 move to dismiss Count 2 of the indictment.

16 THE COURT: It will be dismissed, Count 2.

17 MS. SKUTNIK: And the second request I have of
18 the Court, the Court asked the *Bostic* question and counsel
19 responded. He objected to the length of the sentence, which
20 I do not believe is stated with any particular specificity
21 as to what it is that he's objecting to.

22 So I would ask the Court if Mr. Lazarus could be asked
23 to articulate what it is that he's objecting to since he
24 does have an appellate right in this case.

25 THE COURT: Is there something more specific you

1 would like to add for the record, sir?

2 MR. LAZARUS: We just believe in consideration of
3 all the 3553(a) factors, that a more significant variance
4 below 230 months is warranted. We would ask the Court to
5 consider that under *Bostic*.

6 THE COURT: All right. I'll note for the record
7 that I've considered the argument. I'll simply restate the
8 reasons I've already imposed the Court's sentence.

9 And, again, primarily as I've indicated, I've imposed
10 the 230, below the 240 statutory maximum. I'll note for the
11 record the statutory maximum was the recommendation of the
12 probation staff.

13 I'll further note, just again to address the reasons
14 for the Court's sentence, the length, in the *Bostic* context,
15 is that, as I've indicated, it is very difficult for the
16 Court to vary down any significant extent based upon the
17 defendant's own self-admitted attraction to children.

18 And by his own admission "I'm sexually" -- I'm quoting
19 from his own statement -- "I'm sexually attracted to female
20 minors and female adults. Pertaining to female minors, my
21 sexual preference is for girls between the ages of six to
22 twelve years old."

23 And then go on, again, to review the earlier
24 statements of the defendant, with his history of attraction
25 to children, and his prior history, his prior GSI, and all

1 the other matters is what, again, outside of the guidelines,
2 makes a downward variance further than the ten months I've
3 granted, at least in my view, not warranted.

4 And so I understand that. I make those statements,
5 and again, I refer to the statement of the defendant in this
6 report of Homeland Security.

7 Thank you very much, counsel. We appreciate your
8 courtesy.

9 Let us know, Mr. Lazarus, about the information
10 regarding the additional \$5,000.

11 (Proceedings concluded at 4:20 p.m.)

12
13 C E R T I F I C A T E

14
15 I certify that the forgoing is a correct
16 transcript from the record of proceedings in the
17 above-entitled matter.

18
19 S/Caroline Mahnke 5/7/2019

20 Caroline Mahnke, RMR, CRR, CRC Date
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